

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 645

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

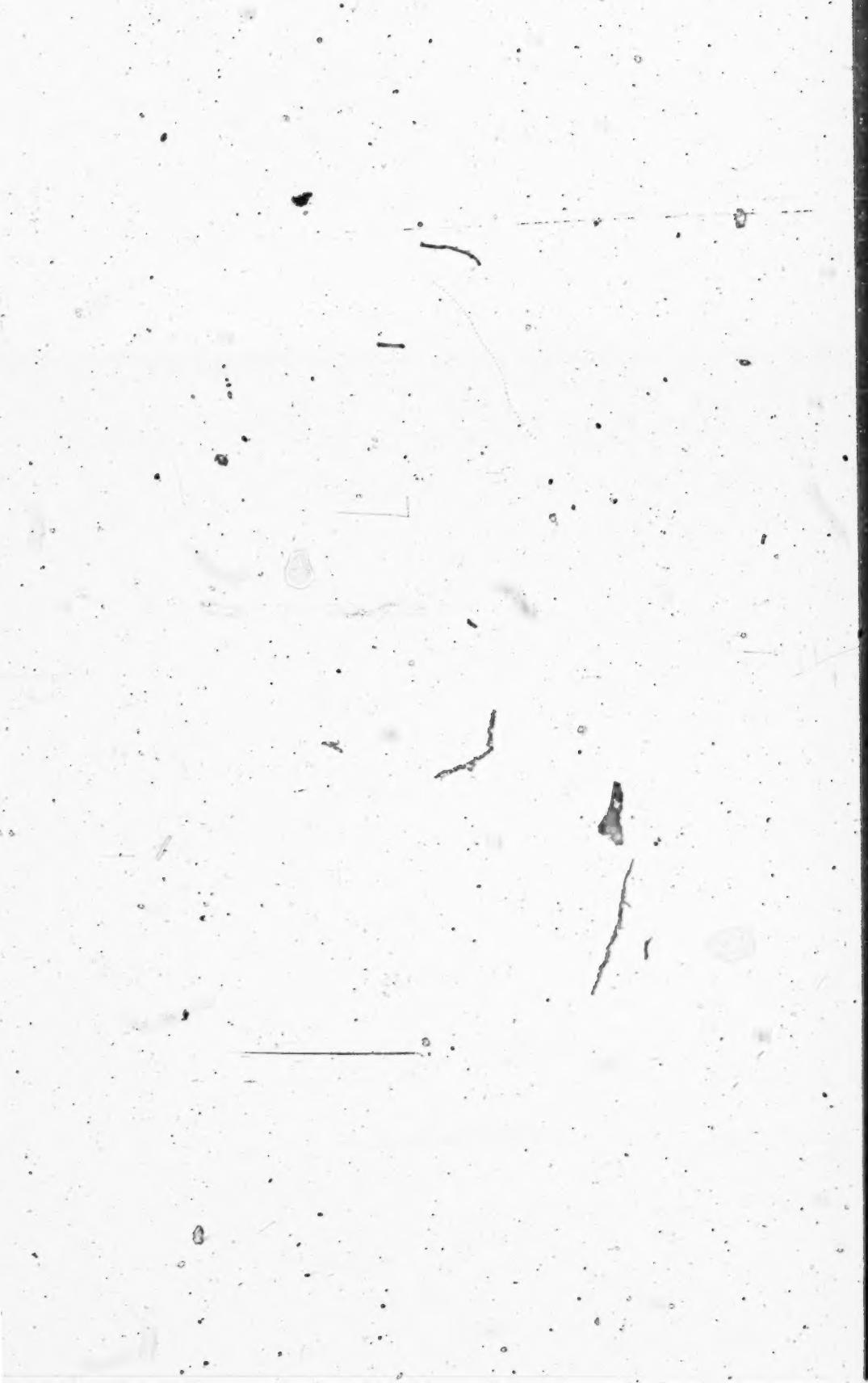
vs.

JAMES Q. NEWTON TRUST

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1941

CERTIORARI GRANTED MARCH 9, 1942



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REVENUE, PETITIONER

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JAMES Q. NEWTON TRUST

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE TENTH CIRCUIT

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A [Caption omitted.]

1 In United States Circuit Court of Appeals for the Tenth
Circuit

No. 2268

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

JAMES Q. NEWTON TRUST, RESPONDENT

Petitioner's designation of record

Filed February 19, 1941

ROBERT B. CARTWRIGHT, Clerk,
U. S. Circuit Court of Appeals for the Tenth Circuit,
Denver, Colo.

Sir: Further reference is made to your letters of February 11, 1931, acknowledging receipt of transcript of record in the above entitled proceedings upon petitions for review by the Commissioner of Internal Revenue, and to our telegram of February 17, 1941, designating the portion of the records in the two cases for printing. We now confirm as our designation of the record to be printed in *Commissioner v. James Q. Newton Trust*, No. 2268, that the entire transcript of record as filed be printed, including the stipulation of facts and the exhibits to stipulation "A" to "N," inclusive.

Respectfully,
For the Attorney General,

SAMUEL O. CLARK, Jr.,
Samuel O. Clark, Jr.,
Assistant Attorney General.

[File endorsement omitted.]

2 Before United States Board of Tax Appeals

JAMES Q. NEWTON TRUST, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 97324

Appearances—For Petitioner: Richard M. Davis, Esq., Quigg Newton, Jr., Esq., For Respondent: A. R. Shannon, Jr., Esq., Carroll Walker, Esq.

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Docket entries

1939

- Mar. 2—Petition received and filed. Taxpayer notified. (Fee paid.)
Mar. 2—Copy of petition served on General Counsel.
Apr. 18—Answer filed by General Counsel.
Apr. 18—Request for Circuit hearing in Denver, Colorado, filed by General Counsel.
Apr. 24—Notice issued placing proceeding on Denver, Colorado, Calendar. Answer and request served.
July 28—Hearing set Sept. 18, 1939, in Denver, Colorado.
Sept. 21—Hearing had before Miss Harron on merits. Stipulation of facts filed. Consolidated for hearing with docket 97325. Petitioner's brief due 11/6/39—respondent's brief due 12/6/39—reply due 12/21/39.
Oct. 9—Transcript of hearing Sept. 21, 1939 filed.
Nov. 6—Brief filed by taxpayer. 11/6/39 copy served.
Nov. 27—Motion for extension to Jan. 6, 1940, to file brief filed by General Counsel. 11/28/39 granted and petitioner's reply due Feb. 6, 1940.

1940

- Jan. 5—Motion for extension to 1/22/40 to file brief filed by General Counsel. 1/6/40 granted—Petitioner's reply due Feb. 21, 1940.
Jan. 24—Motion for leave to file attached brief filed by General Counsel. 1/25/40 granted.
Feb. 5—Motion for extension to March 25, 1940, to file reply brief filed by taxpayer.
Mar. 11—Motion for leave to file the attached reply brief filed by taxpayer. Reply brief lodged. 3/11/40 granted.
Mar. 12—Copy of motion and reply brief served on General Counsel.
Aug. 6—Findings of fact and opinion rendered—Miss Harron, Division 13. Decision will be entered under Rule 50.
Sept. 4—Agreed computation of deficiency filed.
Sept. 6—Decision entered—Miss Harron, Division 13.
Nov. 26—Petition for review by U. S. Circuit Court of Appeals, Tenth Circuit, with assignments of error filed by General Counsel.
Dec. 2—Proof of service filed (counsel).
Dec. 5—Proof of service filed by General Counsel (taxpayer).
Dec. 21—Motion for extension to 2/24/41 to complete and transmit record filed by General Counsel.
Dec. 21—Order enlarging time to 2/24/41 to prepare and transmit the record entered.

1941

- Jan. 8—Statement of points filed by General Counsel with affidavit of service thereon.

1941

- Jan. 8—Designation of portions of record to be contained in review record filed by General Counsel with affidavit of service thereon.
- Jan. 18—Proof of service of filing statement of points filed by General Counsel.
- Jan. 18—Proof of service of filing designation of record filed by General Counsel.

Before United States Board of Tax Appeals

Petition

Filed March 2, 1939

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in notice of deficiency, IT:CL:P-7 (FLD-90D), dated December 3, 1938, and for a finding and determination by the Board of an overpayment by Petitioner of its income tax for the calendar year 1936, in the amount of \$29,994.07, so that when the decision of the Board has become final, such overpayment, together with interest or such other sum as may be recoverable by law, shall be credited or refunded to Petitioner:

As a basis of its proceeding Petitioner alleges, as follows:

1. That Petitioner now is, and at all times herein mentioned has been, a fiduciary trust with its principal office at 828 17th Street, Denver, Colorado. The income tax returns for the period here involved were filed with the Collector of Internal Revenue for the District of Colorado at Denver, Colorado.

2. The notice of deficiency (copy of which is attached hereto and marked "Exhibit A") was mailed to Petitioner on December 3, 1938.

3. The taxes in controversy consist of income taxes for the calendar year 1936. The Respondent, by said notice of deficiency, has determined a deficiency of \$12,425.60, which, together with the aforesaid overpayment of \$29,994.07, is the amount in controversy.

4. The determination of the deficiency is based upon the following errors:

A. The holding of Respondent that the market value of \$60,800.00 face value of 5% Income Mortgage Bonds and 3,040 shares of common stock of The Colorado Fuel & Iron Corporation, on September 1, 1936, was \$85.25 and \$32.25, respectively.

B. The holding of Respondent that the surrender by Petitioner of \$152,000.00 face value Colorado Industrial Company 5% Bonds in exchange for \$60,800.00 face value of 5% Income Mortgage Bonds and 3,040 shares of common stock of The Colorado Fuel & Iron Corporation constituted a taxable exchange.

5. The facts upon which the Petitioner relies as the basis of this proceeding are, as follows:

A. First Assignment of Error

The fair market value of \$60,800.00 face value of 5% Income Mortgage Bonds of The Colorado Fuel & Iron Corporation on September 1, 1936, did not exceed \$79.00 and the fair market value of 3,040 shares of common stock of The Colorado Fuel & Iron Corporation on September 1, 1936, did not exceed \$26.50.

B. Second Assignment of Error

On March 1, 1935, there was filed in the District Court of the United States, for the District of Colorado, In the Matter of The Colorado Fuel and Iron Company and Another, Debtors, Consolidated Cause No. 8081, a Plan of Reorganization. At that time the Colorado Fuel and Iron Company had outstanding its own General Mortgage 5% Bonds, preferred stock and common stock, and it was also the guarantor on the First Mortgage 5% Bonds of the Colorado Industrial Company, a subsidiary corporation.

On April 25, 1936, the Court approved the Plan of Reorganization, which provided that a new company should be organized with an authorized capital of 1,000,000 shares of stock and \$11,052,200.00 5% Income Mortgage Bonds. The new company was to assume the payment of the General Mortgage 5% Bonds of the Colorado Fuel and Iron Company, which were not disturbed; was to issue \$11,053,200.00 of its Income Mortgage Bonds and 552,660 shares of its stock, in exchange for the First Mortgage 5% Bonds of the Colorado Industrial Company, in the ratio of \$400.00 face value of new bonds and 20 shares of stock for each \$1,000.00 face amount of Colorado Industrial Company bonds, and was to issue to preferred and common stockholders of the Colorado Fuel and Iron Company warrants to purchase certain specified amounts of stock of the new company at \$35.00 per share on or before February 1, 1950; 315,379 shares of stock of the new company being reserved for this purpose.

In pursuance of the Plan of Reorganization, The Colorado Fuel and Iron Corporation was organized under the laws of the State of Colorado, and on June 20, 1936, the Court directed

the Colorado Fuel and Iron Company, the Colorado Industrial Company, Arthur Roeder, Trustee, and The New York Trust Company, as Trustee under the Colorado Industrial Company Mortgage securing its First Mortgage 5% Bonds to convey to The Colorado Fuel and Iron Corporation all of their right, title and interest in all of the assets of the Colorado Fuel and Iron Company and the Colorado Industrial Company. Simultaneously therewith, The Colorado Fuel and Iron Corporation was directed to deliver to, or on the order of, the Reorganization Managers \$11,053,200.00 of its Income Bonds, 552,660 shares of its stock and warrants representing the right to purchase 315,379 shares of its stock. This order further provides that upon the surrender of the outstanding bonds of Colorado Industrial Company to the Reorganization Managers, they should distribute to the holders thereof the Income Mortgage Bonds and capital stock of The Colorado Fuel and Iron Corporation to which they were entitled, respectively, under the Plan. And The New York Trust Company, Trustee, was directed to execute and deliver to The Colorado Fuel and Iron Corporation a satisfaction and discharge of the First Mortgage of the Colorado Industrial Company.

On July 1, 1936, the Plan of Reorganization was consummated in accordance with the foregoing order, and thereafter the Petitioner surrendered its \$152,000.00 face amount of Colorado Industrial Company First Mortgage 5% Bonds in exchange for \$60,800.00 face amount of the Income Mortgage Bonds and 3,040 shares of the stock of The Colorado Fuel and Iron Corporation.

At that time no shares of stock of The Colorado Fuel and Iron Corporation, other than the above-mentioned 552,660 shares of stock to be issued to the holders of Colorado Industrial Company First Mortgage 5% Bonds, were issued, so that immediately after the exchange, the holders of said Colorado Industrial Company bonds were in control of The Colorado Fuel and Iron Corporation.

C. Refund of Overpayment

On August 4, 1937, Petitioner paid to the Respondent an additional income tax for the calendar year 1936 amounting to \$29,994.07 on account of the surrender by Petitioner of \$152,000.00 face value of Colorado Industrial Company 5% Bonds in exchange for \$60,800.00 face value of 5% Income Mortgage Bonds and 3,040 shares of common stock of The Colorado Fuel and Iron Corporation.

Wherefore, Petitioner prays that the Board hear this proceeding and determine that there is no deficiency in Petitioner's income tax for the calendar year 1936; and find and determine that the Petitioner overpaid its income tax for the year 1936 in the amount of \$29,994.07, so that when the decision of the Board herein has become final, said overpayment of \$29,994.07, together with interest or such other sum as may be recoverable by law, shall be credited or refunded to Petitioner.

QUIGG NEWTON, Jr.,

Quigg Newton, Jr.,

RICHARD M. DAVIS,

Richard M. Davis,

*Colorado National Bank Building, Denver, Colorado,
Counsel for Petitioner.*

[Verification omitted.]

[For Exhibit "A" referred to herein see Exhibit "C" attached to stipulation of facts which appears on page 49.]

[File endorsement omitted.]

Before United States Board of Tax Appeals

Answer

Filed April 18, 1939

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Denies the allegations contained in paragraph 3 of the petition, except it is admitted that the taxes in controversy are income taxes for the calendar year 1936.
4. Denies that the Commissioner erred as alleged in paragraph 4 of the petition.
5. A, B, and C, inclusive, denies the matter set forth in subparagraphs A to C, inclusive, of paragraph 5 of the petition, except it is admitted that petitioner surrendered \$152,000.00 face amount of Colorado Industrial Company First Mortgage 5% Bonds in exchange for \$60,800.00 face amount of the Income Mortgage Bonds and 3,040 shares of the stock of the Colorado Fuel and Iron Corporation.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) J. P. WENCHEL,

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

R. P. HERTZOG,

Division Counsel,

A. R. SHANNON, Jr.,

Special Attorney,

Bureau of Internal Revenue.

[File endorsement omitted.]

Before United States Board of Tax Appeals

Findings of fact and opinion

Filed Aug. 6, 1940

Corporation A owned all the stock of B. In 1913 it had acquired substantially all the assets of B. B owed to holders of bonds \$27,633,000, principal amount of first mortgage bonds. A also was a debtor to the holders of the bonds, having guaranteed payment of both principal and interest. When the bonds matured in 1934 A and B defaulted on both principal and interest, and filed petitions for corporate reorganization under section 77B of the Bankruptcy Act. The District Court for Colorado approved a plan of reorganization. Pursuant to this plan all the assets of A and B were transferred to C, a new corporation. The holders of the above bonds received stock and bonds of C, in exchange for their bonds and immediately controlled C. Held, the reorganization under section 77B of the Bankruptcy Act constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in section 112 (g) (1) (C).

Richard M. Davis, Esq., and Quigg Newton, Jr., Esq., for the petitioners.

Angus R. Shannon, Jr., Esq., and Carroll Walker, Esq., for the respondent.

In Docket No. 97324, James Q. Newton trust, the Commissioner determined a deficiency in income tax for the year 1936 in the amount of \$12,325.60. Petitioner denies that there is a deficiency in tax and alleges that it has overpaid tax in the amount of

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\$29,941.07. In Docket No. 97325, James Q. Newton, Jr., the Commissioner determined a deficiency in income tax for the year 1936 in the amount of \$690.84. Petitioner denies that there is a deficiency in tax and alleges that he has overpaid tax in the amount of \$296.59. Each petitioner concedes that some of the adjustments giving rise to the deficiency have been determined correctly.

The only question involved is whether the exchange of bonds of the Colorado Industrial Co. for stock and bonds of the Colorado Fuel & Iron Corporation, a newly organized corporation, pursuant to a plan of reorganization under section 77B of the Bankruptcy Act, constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936.

Findings of fact

The James Q. Newton trust is a fiduciary trust, with its principal office at Denver, Colorado. Prior to September 10, 1936, the James Q. Newton trust owned \$152,000 face amount of Colorado Industrial Co. first mortgage 5 percent bonds due August 1, 1934.

James Q. Newton, Jr., is an individual residing in Denver, Colorado. Prior to September 10, 1936, he held \$10,000 face amount of the same bonds of the Colorado Industrial Co.

The Colorado Industrial Co., hereinafter called Industrial, was a Colorado corporation. It was wholly owned by the Colorado Fuel & Iron Co., hereinafter called Fuel & Iron, a Colorado corporation, which owned all of its capital stock, consisting of 200 shares. Fuel & Iron had been engaged in the manufacture and sale of steel and iron products. Industrial was not engaged in any active business and had no assets of any substantial value, having transferred substantially all of its assets to Fuel & Iron in the year 1913.

Under date of August 1, 1904, Industrial issued bonds, generally known as first mortgage 5 percent bonds, which were secured by a mortgage or deed of trust of Industrial. The bonds matured August 1, 1934. These bonds of Industrial were unconditionally guaranteed both as to principal and interest by Fuel & Iron. These bonds were Industrial's only securities outstanding in the hands of the public. The total face amount of these bonds held by the public on August 1, 1934, was \$27,633,000; in addition, Fuel & Iron owned \$7,741,000 face amount. Industrial defaulted in the payment of interest on these bonds due on August 1, 1933, and on subsequent interest installments; and Fuel & Iron defaulted under its guarantee of interest payments.

Fuel & Iron had outstanding in the hands of the public in 1933 \$4,500,000 face amount of bonds known as general mortgage 5

percent bonds. On August 1, 1933, Fuel & Iron defaulted in the payment of the semiannual interest due on its bonds. On the same day a receiver for the properties of Fuel & Iron was appointed by the United States District Courts of Colorado and Wyoming. Following the receivership of Fuel & Iron, committees were constituted for the purpose of representing bondholders and stockholders of Fuel & Iron and for the bondholders of Industrial. There was outstanding stock of Fuel & Iron consisting of 20,000 shares of 8 percent cumulative preferred stock, \$100 par value per share, and 340,505 shares of common stock, no par value. The preferred stock was entitled to cumulative dividends at the rate of 8 percent per annum, but ranked equally with the common stock in the distribution of assets. Dividends had not been paid on the preferred stock since November 25, 1931.

On August 1, 1934, when Industrial and Fuel & Iron defaulted on Industrial's first mortgage 5 percent bonds, each company filed petitions with the United States District Court for Colorado instituting proceedings for reorganization under section 77B of the Federal Bankruptcy Act. The previously appointed receiver of Fuel & Iron was appointed trustee of the properties of both companies in the reorganization proceedings.

11. A plan of reorganization of Fuel & Iron and Industrial, dated March 1, 1935, was drafted by the reorganization managers at the request of the separate committees for the bondholders of the two companies, and this proposed plan pursuant to section 77B of the Bankruptcy Act, was filed with the District Court. On May 1, 1935, an order of the District Court was entered finding and decreeing that the plan complied with the provisions of subdivision (b) of section 77B of the Bankruptcy Act, and that it had been duly prepared in accordance with subdivision (d) of section 77B. Among other things the court directed the trustee to mail copy of the plan and forms of acceptance of the plan to holders of bonds and stocks of Fuel & Iron, and of bonds of Industrial, which was done. Acceptances of the plan were filed by the holders of Industrial bonds and of the preferred and common stock of Fuel & Iron as follows:

Security	Amount outstanding	Plan approved by holders of—
Industrial bonds.....	\$27,633,000	75.7%
Fuel & Iron pfd. stock (shares).....	20,000	61.3%
Fuel & Iron com. stock (shares).....	340,505	63.2%

On April 25, 1936, the District Court entered its order confirming the plan. By this order the court approved the certificate of incorporation of a new corporation, the Colorado Fuel & Iron Corporation, hereinafter referred to as the new company.

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That certificate had been filed in the office of the Secretary of State of Colorado on April 16, 1936. The authorized capital of the new company was 1,000,000 shares of common stock without par value. On June 20, 1936, the District Court entered its order approving forms of documents and directing, among other things, the transfer of all of the assets of Fuel & Iron and Industrial to the new company, which was done by executing proper conveyances.

The purpose of the reorganization plan was as follows:

- (1) To strengthen the capital structure of the enterprise, through drastic reduction of fixed charges and the provision of a financing medium for future financial requirements.
- 12 (2) To give full recognition to the paramount rights of bondholders.
- (3) To enable the stockholders to regain an interest in the enterprise upon a basis which takes account of the present junior rank of the stockholders and of the relative rights and priorities of the two classes of stock.

The effect of the plan was to give to the holders of Industrial's bonds the entire ownership and control of the new company, subject to \$4,500,000 bonds of Fuel & Iron which were not to be disturbed in the reorganization. Since the Industrial bonds were in default on both principal and interest, the only stock of the new company to be issued was 552,660 shares which were to be issued to the holders of Industrial bonds in exchange.

Under the approved plan of reorganization and orders of the District Court the following was done:

(1) As of July 1, 1936, the assets of Fuel & Iron and of Industrial were transferred by proper conveyances to the new company.

(2) The new company issued 552,660 shares of its stock to be distributed to holders of bonds of Industrial, reserved 315,379 shares to be applied against warrants, and reserved the remaining 131,961 shares for corporate purposes. It issued \$11,053,200 principal amount of 5 percent income mortgage bonds due April 1, 1970, to be distributed to Industrial's bondholders. It assumed payment of \$4,500,000 general bonds of Fuel & Iron, which bonds were not affected by the reorganization plan. It issued warrants for the purchase, on or before April 1, 1950, of 315,379 shares of its stock at \$35 a share to be distributed to the preferred and common stockholders of Fuel & Iron. The warrant agreement entered into between the new company and the Chase National Bank of New York, warrant agent, under date of July 1, 1936, provided that the holders of warrants should not have the right to vote or to receive notice as stockholders, and should have no rights whatsoever as stockholders of the new

company. The option price under the warrants was considerably higher than the opening market price for shares of the new company.

(3) The reorganization managers gave notice to the
13 holders of Industrial's bonds and Fuel & Iron's stock that
the new securities would be available for distribution on
September 1, 1936.

(4) At or about that date the holders of Industrial bonds surrendered their bonds for cancellation in exchange for income mortgage bonds and stock of the new company upon the basis of (a) \$400 principal amount of income bonds and (b) 20 shares of common stock for each \$1,000 principal amount of Industrial bonds. Immediately after the consummation of the plan all of the issued stock of the new company, 552,660 shares of common stock, belonged to the former holders of bonds of Industrial. No stock was issued to parties other than such bondholders until October 23, 1936, when 37 shares were issued upon the exercise of warrants, and by June 30, 1938, only 465 shares had been issued upon the exercise of warrants.

(5) At or about the same date warrants to purchase common stock of the new company were distributed to preferred and common stockholders of Fuel & Iron as follows: For each share of preferred stock of Fuel & Iron, one warrant to purchase, on or before February 1, 1950, three shares of common stock of the new company at \$35 per share. For each share of common stock of Fuel & Iron there was given one warrant to purchase three-fourths of one share of common stock of the new company at \$35 a share.

(6) The capital stock of Industrial was canceled. Also \$7,741,000 principal amount of Industrial's bonds owned by Fuel & Iron were canceled. The first mortgage of Industrial which had secured its bonds was satisfied and discharged. These bonds had been held in Fuel & Iron's treasury, but they had not been set up as an asset or liability on the books. The amount of Industrial's bonds that had been carried on Fuel & Iron's books as a liability was \$27,633.00.¹

14 On September 10, 1936, petitioner, the James Q. Newton trust, surrendered its Industrial bonds in the face amount of \$152,000 and received in exchange \$60,800 face amount of in-

¹ The aggregate amount of Industrial's bonds in default on August 1, 1934, carried on Fuel & Iron's books was \$27,633,000. The Industrial bonds had been set upon on Fuel & Iron's books as a liability in the following way:

Industrial bonds authorized	\$45,000,000
Issued	39,000,000
Redeemed and canceled	3,626,000

Less—held in treasury	35,374,000
	7,741,000
Principal amount in default	27,633,000

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come mortgage bonds and 3,040 shares of stock of the new company.

On September 10, 1936, the petitioner, James Q. Newton, Jr., surrendered his Industrial bonds in the face amount of \$10,000 and received in exchange \$4,000 face amount of income mortgage bonds and 200 shares of stock in the new company.

On the date of exchange the fair market value of the securities of the new company received in exchange by petitioners was \$79 for each \$100 face amount of income mortgage bonds and \$27.25 for each share of stock. The total fair market value on the date of exchange of the securities of the new company received by the James Q. Newton trust was \$130,872, and the total fair market value on the date of exchange of the new securities received by James Q. Newton, Jr., was \$8,610.

Opinion

Harron: The petitioners contend that the reorganization of Fuel & Iron and Industrial under section 77B of the Bankruptcy Act, which resulted in an exchange of bonds of Industrial for bonds and stock of the new company, constituted a reorganization as defined in either provision (A) or (C) of section 112 (g) (1)² of the Revenue Act of 1936, so that recognition of gain or loss is precluded under section 112 (a) and (b) (3)³ of the same act. The petitioners further contend that, if the transaction did not constitute a "reorganization" within the meaning of the above sections, nevertheless any gain resulting therefrom is nontaxable under section 112 (b) (5) of the Revenue Act of 1936.⁴

* SEC. 112. RECOGNITION OF GAIN OR LOSS.

(g) Definition of Reorganization.—As used in this section and section 113—

(1) The term "reorganization" means (A) a statutory merger or consolidation, or (C) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (D) a recapitalization, or (E) a mere change in indemnity, form or place of organization, however effected.

* SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges Solely in Kind.—

(3) Stock for Stock or Reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* SEC. 112. RECOGNITION OF GAIN OR LOSS.

(b) Exchanges Solely in Kind.—

(5) Transfer to Corporation Controlled by Transferor.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such persons or persons are in control of the corporation; but in the case of an exchange to two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

The respondent contends that there was not a "statutory merger or consolidation" within (A) of section 112 (g) (1), since the facts fail to show that the plan of reorganization under section 77B was executed by a merger or consolidation in pursuance of the laws of Colorado or Federal law. Respondent relies upon the statement in article 112 (g)-2 of Regulations 94 that, "The words 'statutory merger or consolidation' refer to a merger or a consolidation effected in pursuance of the corporation laws of the United States or a State or Territory or the District of Columbia." The respondent also contends that the reorganization under 77B of the Bankruptcy Act does not come within the definition of a reorganization in the applicable revenue act, within (C) of section 112 (g) (1). Respondent argues that the bond-holders of Industrial may not be considered as the "stockholders of the transferor." He relies on the fact that stockholders of Fuel & Iron were given warrants to buy stock in the new company. But, conceding for purposes of argument, that the stockholders of the transferor lost their equity in the properties transferred to the new company and that this case comes within the rule of *Commissioner v. Kitselman*, 89 Fed. (2d) 458; certiorari denied, 302 U. S. 709, respondent argues that the opinion in

LeTulle v. Scofield, 308 U. S. 415, strongly indicates that the

16 *Kitselman* case was wrongly decided. Respondent concedes that the facts in the *LeTulle* case differ from and are not analogous to the facts in the *Kitselman* case or in this case.

Petitioner urges at length that there was a "statutory" consolidation of Industrial and Fuel & Iron under a Federal statute namely, subsection (b) (9) of section 77B of the Bankruptcy Act. See *United States Statutes at Large*, 73d Cong., vol. 48-1, pp. 1912-1914.⁵ We do not agree with this contention. First, in our opinion the Commissioner's statement in article 112 (g)-2 of Regulations 94, quoted above, appears to be correct and a statement of the obvious. Second, the power to effect a consolidation of corporations "must be derived from the law of the sovereignty or state which creates the corporation seeking to exercise it", Fletcher, *Cyclopedia of Corporations*, vol. 15, ch. 61, sec. 7048, and the steps and proceedings to effect a consolidation are formal and must be in accordance with the law of the jurisdiction. Fletcher, *Cyclopedia of Corporations*, supra, secs. 7066-7074. While a corporation formed to carry out steps in a plan of reorganization

* Sec. 77B. Corporate Reorganizations.—
 (b) A plan of reorganization within the meaning of this section shall provide adequate means for the execution of the plan, which may include the transfer of all or any part of the property of the debtor to another corporation or to other corporations, or the consolidation of the properties of the debtor with those of another corporation, or the merger or consolidation of the debtor into or with another corporation or corporations, or

under section 77B of the Bankruptcy Act may be under the control of the Federal District Court having jurisdiction, a new corporation can come into existence only in compliance with state authority. *Old Fort Impovement Co. v. Lea*, 89 Fed. (2d) 286. In the proceedings involved here, the charter of the new company was obtained from the State of Colorado. The statutes of Colorado prescribe the way in which a consolidation may be consummated. *Comp. Laws of Colorado, 1921, ch. 38 D., p. 754, sec. 2287; 1935 Colorado Stats. Ann., ch. 41 sec. 54.* So far as the facts show, no articles of consolidation or merger were filed in the proper State office. The plan of reorganization approved by the District Court does not refer to a consolidation as the means of executing the plan. The provisions of subsection (b) (9) of section 77B of the Bankruptcy Act provided for several permissive methods of executing a plan of reorganization, among which are a merger or consolidation. But it may not be assumed that a "statutory merger or consolidation" was effected merely from the general facts relating to the way in which a reorganization under section 77B is executed. It is a matter to be proved whether such a plan of reorganization was executed by a statutory merger or consolidation, and, in our opinion, petitioner has not so proved in this case. See also Report of Committee on Ways and Means, No. 704, 73rd Cong., 2d sess., p. 14, for the reasons for inserting the word "statutory" before "merger or consolidation" in section 112 (g) (1) (A) of the Revenue Act of 1934.

However, we are of the opinion that the reorganization under section 77B of the Bankruptcy Act constituted a reorganization under section 112 (b) (3) of the Revenue Act of 1936, within (C) of section 112 (g) (1). In our opinion the situation here is very much like the situation in the Kitselman case, *supra*, and the question is controlled by that case. In the Kitselman case, after the various steps had been taken, the bondholders of the old company were in control of the new company, and this somewhat unusual situation presented difficulty because section 112 (g) (1) (C) predicates a reorganization on the requirement that the transferor or the stockholders of the transferor be in control of the new company. The court reasoned that where the old company is insolvent and its assets are transferred to a new company formed by the bondholders' representatives, the bondholders occupy a status somewhat akin to that of preferred stockholders, for all practical purposes. The court stated the following:

Bondholders ordinarily are viewed as creditors, but when the assets of the corporation are less than its obligations, the bond-

holders are in actuality and for all practical purposes pretty much the corporation. * * *

It is clear that the bondholders were the moving spirit and were treated as the owners in fact, and it follows that they must be viewed as a class of "stockholders" somewhat akin to preferred stockholders with cumulative dividend rights. * * * Where the assets of the corporation fall far below the amount required to pay the bondholders in full, the bondholders in bankruptcy reorganization supersede the stockholders. They acquire

18 the stockholders' rights to manage the corporate affairs.

There is a difference between the position of stockholders in a case like the present one and stockholders of a corporation in bankruptcy proceeding under section 77B (U. S. C. A. § 207) to a reorganization, but the analogies are sufficient to justify a study of the decisions in the latter field.

The above reference in the quotation to a reorganization under section 77B of the Bankruptcy Act is significant here. In our opinion the situation in this case is as favorable, if not more favorable, to petitioner's contention than was the situation in the Kitselman case, because here there was a reorganization under section 77B of the Bankruptcy Act.

As in the Kitselman case, the difficulty is that of determining whether the holders of the Industrial bonds were the "transferor or its stockholders" within that clause in (C) of section 112 (g) (1). The situation is somewhat more complex here because there were two transferors, Industrial and Fuel & Iron, albeit they were subsidiary and parent corporations, and the holders of the Industrial bonds were creditors of both companies, Fuel & Iron having acquired substantially all the assets, securing the bonds under a first mortgage, and having unconditionally guaranteed the interest and principal of the bonds of Industrial. However, this complexity is not important, in our opinion. Neither the bondholders nor the stockholders of either of the old companies received any profit from the reorganization. The old companies transferred all their assets to the new company and immediately thereafter the old companies, through the bondholders, were in control of the corporation to which the assets were transferred. The holders of Industrial bonds were creditors having claims aggregating \$27,633,000 for principal due, and \$2,763,300 for interest due. They were the creditors with prior claims, secured by a first mortgage on assets in the hands of Fuel & Iron, and they were treated as the owners in fact of the assets transferred to the new company. It must follow here, as in the Kitselman case, that the holders of the Industrial bonds

be viewed, as a class of "stockholders." So viewed, they come within (C) of section 112 (g) (1).

The following is pointed out in support of the above conclusion.

Industrial and Fuel & Iron had been placed in receivership and had petitioned for a reorganization under section 77B of the Bankruptcy Act. The stockholders of both of the companies had lost their equity. This was recognized by the plan of reorganization, under which the entire ownership of the new company was turned over to the holders of Industrial bonds, and the stockholders were given, merely, warrants entitling them to purchase stock in the new company at a price considerably above the then market value. The treatment accorded various security holders of the old companies is described in the plan of reorganization as follows:

Under the Plan, the Industrial Bondholders are to receive for each \$1,000 principal amount of Bonds (together with the unpaid interest thereon which amounted to 10% to February 1, 1935): (a) \$400 principal amount of new 5% Income Mortgage Bonds and (b) 20 shares of new Common Stock. *The Industrial Bondholders are to receive all of the new Income Mortgage Bonds and all of the new Common Stock of the New Company to be presently issued in the reorganization.* The entire issue of Industrial Bonds outstanding in the aggregate principal amount of \$27,633,000 is in default. Interest on the Industrial Bonds accrued and unpaid to February 1, 1935, amounts to \$2,763,300. Accordingly, in the first instance, *the Plan gives to the holders of the Industrial Bonds the entire ownership and control of the New Company, subject to \$4,500,000 of Fuel Bonds which are undisturbed in the reorganization.*

The Plan, however, does not in its effect on stockholders operate as a strict foreclosure, since the stockholders are to receive Warrants entitling them at their option to purchase, at any time until February 1, 1950, a stock equity in the New Company at \$35 per share. The price at which stockholders, under the terms of such Warrants, may regain an equity position in the enterprise, takes into consideration the basis upon which the Industrial Bondholders are to receive shares of new Common Stock in exchange for that part of their debt not covered by new Income Mortgage bonds. [Italics supplied.]

The assets of the old companies were transferred to the new company, and immediately thereafter the bondholders were in control of the new company by virtue of the immediate transfer of 552,660 shares of stock of the new company to the reorganization managers, who were the agents of the bondholders. The holders of warrants to purchase new stock in the new company had no control. Control relates to

issued, not to authorized stock. *Louangel Holding Corporation v. Anderson*, 9 Fed. Supp. 550. *C. T. Investment Co. v. Commissioner*, 88 Fed. (2d) 582. Clearly there was an exchange of securities in one corporation a party to a reorganization, in pursuance of a plan of reorganization, solely for securities in another corporation a party to the reorganization. (Sec. 112 (b) (3).) All three corporations were parties to the reorganization. (Sec. 112 (g) (2).) The bondholders of Industrial retained a substantial stake or proprietary interest in the enterprise. There was a continuity of interest of the transferors in the transferee, evidenced by stocks and bonds of the new company. The holders of Industrial bonds acquired the stockholders' rights to manage the corporate affairs.

With respect to the argument of respondent that the opinion in the *LeTulle* case indicates that the decision in the *Kitselman* case is wrong, and that *Helvering v. Tyng*, 308 U. S. 527, also points that way, we believe the argument without merit. The fact that the bondholders herein retained a proprietary interest in the enterprise is a material difference between the factual situation in this case and the factual situation in either the *LeTulle* case or the *Tyng* case. Such cases are therefore clearly distinguishable and not applicable here. In the *LeTulle* case when a stockholder of the transferor received bonds and cash of the transferee in exchange for his stocks, there was no continuity of interest. In the *Tyng* case, where the stockholders of the transferors received cash and long-term indebtedness of the transferee in exchange for their stock, there was no continuity of interest. In both the *LeTulle* case and the *Tyng* case stockholders of the transferor became mere creditors and the transferee, whereas in this case creditors (the Industrial bondholders) became stockholders of the transferee, and after the transfer they were in control of the corporation to which the assets were transferred. Also, we believe that *E. P. Raymond*, 37 B. T. A. 423, cited by respondent, is not applicable here. The point in this case is that the bondholders received all the presently issued stock of the new company, thereby gaining control therof.

It is held that the reorganization under section 77B of the Bankruptcy Act was executed so as to constitute a reorganization as defined in section 112 (g) (1) (C), and the gain or loss resulting therefrom is not recognizable under section 112 (b) (8). See also *Commissioner v. Newberry Lumber & Chemical Co.*, 94 Fed. (2d) 447; *Marlborough House, Inc.*, 40 B. T. A. 882; *Edith M. Greenwood*, 41 B. T. A. 664; *Alabama Asphaltic Limestone Co.*, 41 B. T. A. 324.

In view of the foregoing it is not necessary to consider whether or not the transactions come within section 112 (b) (5).

18-4 GUY T. HELVERING VS. JAMES Q. NEWTON TRUST

Reviewed by the Board.

Decision will be entered under Rule 50.

VAN FOSSAN, LEECH, TURNER, and DISNEY dissent.

MURDOCK dissents for reasons expressed in his dissent in Alabama Asphaltic Limestone Co., 42 B. T. A. 324.

Before United States Board of Tax Appeals

Decision

Pursuant to the Board's Findings of Fact and Opinion promulgated August 6, 1940, the petitioner herein having on September 4, 1940, filed a recomputation of tax, and the respondent having agreed thereto, now, therefore, it is

Ordered and Decided: That there is an overpayment in income tax for the year 1936 in the amount of \$29,994.07 which amount was paid within three years before the filing of the petition (Sec. 809 (a), Revenue Act of 1938).

(s) MARION J. HARRON,
Member.

Entered Sept. 6, 1940.

In United States Circuit Court of Appeals

Petition for review and assignments of error

Filed Nov. 26, 1940

To the Honorable Judges of the United States Circuit Court of Appeals for the Tenth Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Charles E. Lowery, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

Jurisdiction

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States; that the respondent on review, James Q. Newton Trust (hereinafter sometimes referred to as the taxpayer), is a fiduciary trust having its principal office at 828 Seventeenth Street, Denver, Colorado. The taxpayer filed its Federal fiduciary return of income (Form 1041) and its Federal individual income tax return (Form 1040) for

the year 1936 with the Collector of Internal Revenue for the District of Colorado, whose office is located in the City of Denver, Colorado, and within the judicial circuit of the United States Circuit Court of Appeals for the Tenth Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II

Prior Proceedings

On December 3, 1938, the Commissioner determined a deficiency in Federal income tax liability against the taxpayer for the year 1936 in the amount of \$12,325.60 and sent to the taxpayer, by registered mail, a notice of said deficiency in accordance with the provisions of existing internal revenue laws. Thereafter and on March 2, 1939, the taxpayer filed an appeal from said determination of the Commissioner with the United States Board of Tax Appeals.

The case was duly tried to the United States Board of Tax Appeals and on August 6, 1940, the Board promulgated its findings of fact and opinion (42 B. T. A. — No. 73), pursuant to which opinion decision was entered on September 6, 1940, wherein and whereby it was ordered and decided that there is an overpayment in income tax for the year 1936 in the amount of \$29,994.07.

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III

Nature of Controversy

Prior to September 10, 1936, the taxpayer trust was the owner of \$152,000 face amount of first mortgage 5 percent bonds of the Colorado Industrial Company, a Colorado corporation (hereinafter referred to as Industrial), which bonds were due on August 1, 1934. The capital stock of Industrial was wholly owned by the Colorado Fuel & Iron Company (hereinafter called Fuel & Iron) and its bonds were unconditionally guaranteed as to principal and interest by the latter company. Industrial's bonds of the face amount of \$27,633,000 were held by the public on August 1, 1934, and \$7,741,000 face amount thereof was held by Fuel & Iron. Industrial defaulted in the payment of interest on its bonds on August 1, 1933, and on subsequent interest installments, and Fuel & Iron defaulted under its guarantee of interest payments.

In 1933 Fuel & Iron had \$4,500,000 face amount of general mortgage 5 percent bonds outstanding in the hands of the

public. It defaulted in the payment of the semi-annual interest due on those bonds on August 1, 1933. On the latter date a receiver was appointed for Fuel & Iron's properties by the United States District Courts of Colorado and Wyoming. When the two corporations later defaulted on Industrial's first mortgage 5 percent bonds, on August 1, 1934, each company filed a petition with the United States District Court of Colorado seeking a reorganization under Section 77B of the Federal Bankruptcy Act, whereupon the receiver previously appointed for Fuel & Iron was appointed trustee of the properties of both companies. On April 25, 1936, the District Court confirmed a plan of reorganization previously filed with the Court and accepted by a majority of Industrial's bondholders and Fuel & Iron's common and preferred stockholders. The Court approved the certificate of incorporation of a new corporation, the Colorado Fuel & Iron Corporation, and on June 20, 1936, entered its order directing, among other things, the transfer of all of the assets of Fuel & Iron and Industrial to the new corporation which was done, as of July 1, 1936, by the execution of proper conveyances.

Under the plan of reorganization as approved by the Court, the only stock of the new company to be issued was
24 552,660 shares which were to be issued to the holders of Industrial's bonds in exchange. Pursuant to the plan the new company issued 552,660 shares of its stock to be distributed to the holders of Industrial's bonds, reserved 315,379 shares to be applied against warrants which it issued, in accordance with the plan, to the preferred and common stockholders of Fuel & Iron, and reserved the remaining 131,961 shares for corporate purposes. The warrants were issued, under the plan, to enable Fuel & Iron's stockholders to regain an interest in the enterprise, if they so desired, at \$35 a share on or before April 1, 1950, but the warrant agreement filed with the Chase National Bank of New York, warrant agent, provided that the holders of warrants should have no rights whatsoever as stockholders of the new company. During the year 1936, only 37 shares of stock of the new company were issued by reason of the exercise of warrants. The new company also issued, pursuant to the plan, \$11,053,200 principal amount of five percent income mortgage bonds due April 1, 1970, to be distributed to Industrial's bondholders, and assumed payment of the \$4,500,000 face amount of Fuel & Iron's general bonds. Industrial's bondholders thereupon gained the entire ownership and control of the new company subject to the \$4,500,000 bonds of Fuel & Iron which were not disturbed in the reorganization.

On September 10, 1936, the taxpayer surrendered its Industrial bonds in the face amount of \$152,000 and received therefor \$60,800 face amount of income mortgage bonds and 3,040 shares of stock of the new company. In his notice of deficiency the Commissioner treated the exchange as a taxable one. The taxpayer contended that the Section 77B reorganization of Fuel & Iron and Industrial constituted a nontaxable reorganization under Section 112 of the Revenue Act of 1936. The Board of Tax Appeals agreed with the taxpayer's contention and redetermined the tax liability accordingly.

IV

Assignments of Error

The Commissioner avers that in the record and proceedings before the United States Board of Tax Appeals and in the opinion and final decision rendered and entered by the United States Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now 25 assigns the following errors and each of them, which he avers occurred in said record, proceedings, opinion, and final decision so rendered and entered by the United States Board of Tax Appeals:

The United States Board of Tax Appeals erred—

1. In ordering and deciding that there is an overpayment in income tax for the year 1936 in the amount of \$29,994.07.
2. In failing to sustain the deficiency determined by the Commissioner, less a proper reduction of said deficiency to reflect the adjustment agreed upon by the parties at the hearing before the United States Board of Tax Appeals.
3. In holding and deciding that the reorganization under Section 77B of the Bankruptcy Act constituted a reorganization under Section 112 (b) (8) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).
4. In failing to hold and decide that the reorganization under Section 77B of the Bankruptcy Act did not constitute a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).
5. In holding that there was a continuity of interest of the transferors in the transferee within the scope and meaning of Section 112 (g) (1) (C) of the Revenue Act of 1936.
6. In holding and deciding that the gain resulting to the taxpayer from the exchange was not recognizable under Section 112 (b) (3).

7. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

Wherefore, the Commissioner petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Tenth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of that Court and transmitted to the Clerk of said Court for filing, and that appropriate action to be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(S) SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

CHARLES E. LOWERY,
Special Attorney,
Bureau of Internal Revenue.

[Verification omitted.]
[File endorsement omitted.]

Notice of filing petition for review

Filed Dec. 2, 1940

To Richard M. Davis, Esq., Quigg Newton, Jr., Esq., Colorado National Bank Building, Denver, Colorado:

You are hereby notified that the Commissioner of Internal Revenue did, on the 26th day of November 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of errors as filed is hereto attached and served upon you.

Dated this 26th day of November 1940.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

Service of the above and foregoing notice, together with a copy of the petition for review and assignments of error

mentioned therein is hereby acknowledged this 29th day of November 1940.

(s) RICHARD M. DAVIS,

(s) QUIGG NEWTON, JR.,

Counsel for Respondent on Review.

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Notice of filing petition for review

Filed Dec. 5, 1940

To James Q. Newton Trust, 828 Seventeenth Street, Denver, Colorado.

You are hereby notified that the Commissioner of Internal Revenue did, on the 26th day of November 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Tenth Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 26th day of November 1940.

(Signed) J. P. WENCHEL,

R. L. W.

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 29th day of November 1940.

JAMES Q. NEWTON TRUST,

By JAMES Q. NEWTON, Jr.,

Trustee,

Respondent on Review.

[File endorsement omitted.]

Before United States Board of Tax Appeals

Stipulation of facts

(Filed at Hearing September 21, 1939)

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following is a true statement of the facts herein involved:

1. Petitioner is, and at all times herein mentioned was, a fiduciary trust, with its principal office at 828 Seventeenth Street, Denver, Colorado. The fiduciary income tax return and the amended return filed on Form 1040 herein involved (copies of which marked, respectively, Exhibits "A" and "B," are attached hereto and by this reference made a part hereof) were filed with the Collector of Internal Revenue for the District of Colorado, at Denver, Colorado. At all times herein mentioned Petitioner has kept its books and filed its returns on a cash receipts and disbursements basis.

2. The notice of deficiency (copy of which is attached hereto marked Exhibit "C"), was mailed to Petitioner on December 3, 1938.

3. The taxes in controversy consist of income taxes for the calendar year 1936 in two amounts:

(a) The amount of \$29,994.07 which Petitioner paid under protest upon filing its amended return and which Petitioner claims is an overpayment.

(b) The amount of \$12,325.60 being the deficiency determined by the Respondent's notice of deficiency.

The total amount in controversy, therefore, is \$42,319.67.

4. On March 12, 1935, there was filed in the District Court of the United States, for the District of Colorado, In the Matter of The Colorado Fuel and Iron Company and Another, Colorado Corporations, Debtors, Consolidated Cause No. 8081; a Plan of Reorganization (a copy of which, marked "Exhibit D" is attached hereto and by reference made a part hereof). At that time The Colorado Fuel and Iron Company had outstanding its own General Mortgage Five Per Cent. Bonds, preferred stock and common stock, and it was also the guarantor on the First Mortgage Five Per Cent Bonds of The Colorado Industrial Company, a wholly owned subsidiary. These bonds of the Colorado Industrial Company were its only securities outstanding in the hands of the public. Both of these corporations were before the Court on their petitions for reorganization under Section 77-B of the Bankruptcy Act, filed August 1, 1934.

5. On March 12, 1935, the Court entered its order finding that the Plan had been proposed in accordance with the provisions of Section 77-B and ordering that the holders of Colorado Industrial Company Bonds and the preferred and common stockholders of The Colorado Fuel and Iron Company be notified of the Plan and given the opportunity to express their acceptance thereof. Copies of said Order and of the form of acceptance for bonds in registered and in bearer form, marked

Exhibits "E," "F," and "G," are attached hereto and by this reference made a part hereof.

6. On April 25, 1936 the Court entered its Findings of Fact and Conclusions of Law and its Order confirming the Plan of Reorganization and finding that it was fair and equitable and did not discriminate unfairly in favor of any class of creditors or stockholders. A copy of these Findings, Conclusions and Order, marked Exhibit "H", is attached hereto and by this reference made a part hereof. The Plan of Reorganization, as so approved, provided that a new company should be organized with an authorized capital of 1,000,000 shares of stock and \$11,053,200.00 Five Per Cent. Income Mortgage Bonds. The new company was to assume the payment of the General Mortgage Five Per Cent. Bonds of The Colorado Fuel and Iron Company. It was to issue \$11,053,200.00 of its Income Mortgage Bonds and 552,660 shares of its stock in exchange for the bonds of The Colorado Industrial Company guaranteed by The Colorado Fuel and Iron Company, in the ratio of \$400.00 face value of new bonds and 20 shares of stock for each \$1,000.00 face amount of Colorado Industrial Company bonds. Since the Industrial Company bonds were then in default on both principal and interest, such 552,660 shares issued to the holders of Industrial Bonds were the only shares of the new company to be presently issued. The new company was to give to the preferred and common stockholders of the old Colorado Fuel and Iron Company merely warrants to purchase certain specified amounts of stock of the new company at \$35.00 per share on or before February 1, 1950, which option price was considerably higher than the opening market price for shares of the new company. Three Hundred fifteen thousand, three hundred seventy-nine shares of stock of the new company were reserved for this purpose. Thus, the Plan provided that 1,000,000 shares of the new company should be authorized. Of this number, 552,660 shares were to be issued to the holders of Industrial Bonds; 315,379 shares were to be reserved to apply against warrants, when, as and if the 30 option were exercised; and the remaining 131,961 shares were reserved for corporate purposes.

7. In pursuance of the Plan of Reorganization and the Orders of April 25, 1936, the new company, The Colorado Fuel and Iron Corporation, was organized under the laws of the State of Colorado, and on June 20, 1936, the Court entered its Order approving the form of documents and directing the transfer of assets to, and the issuance of securities and assumption of liabilities by, the new company. A copy of this Order, marked "Ex-

hibit I," is attached hereto and by this reference made a part hereof. It provided that on July 1, 1936, The Colorado Fuel and Iron Company, The Colorado Industrial Company, Arthur Roeder, Trustee of the assets of both, and The New York Trust Company, as Trustee under the Colorado Industrial Company mortgage, should convey to The Colorado Fuel and Iron Corporation all their right, title and interest in all of the assets of The Colorado Fuel and Iron Company and the Colorado Industrial Company. Simultaneously, or promptly thereafter, The Colorado Fuel and Iron Corporation was directed to deliver to, or on the order of, the Reorganization Managers \$11,053,200.00 of its Income Bonds, 552,660 shares of its stock and warrants representing the right to purchase 315,379 shares of its stock. Simultaneously, or promptly thereafter, The New York Trust Company, as Trustee of this first mortgage of the Industrial Company, was directed to execute a satisfaction and discharge of the First Mortgage of the Industrial Company. As soon as reasonably practicable, the Reorganization Managers were directed to distribute to the holders of Industrial Bonds the new Income Bonds and all of the stock of the new company to be issued, and to distribute to the preferred and common stock-holders of the old company warrants to purchase stock in accordance with the terms of the warrant agreement. A copy of said warrant agreement, marked "Exhibit J," is attached hereto and made a part hereof.

8. The order further provided as follows (Ar. Two, Par. F, p. 7):

31 "The provisions of this Order directing the transfer and delivery of the properties and assets of the Debtors to the New Company, the assumption by the New Company of certain obligations of the Debtors and of the Trustee as hereinabove and in Article Three hereof provided, and the issue by the New Company to or on the order of, and the distribution by, the Reorganization Managers of the New Securities, shall be a single and entire order and direction, notwithstanding the provisions hereof permitting the transfer of said properties and assets forthwith and without awaiting the assumption by the New Company of said liabilities or the issue, delivery and distribution of the New Securities."

Similarly it directed that any dividends or interest paid with respect to any of the new securities during the period when such new securities were held by the Reorganization Managers or distributing agents should be held by them and paid to the

holders of the Industrial Bonds as soon as the physical exchange was effected.

9. Pursuant to Article Five of said Order of June 20th, the Reorganization Manager's gave notice to the holders of Industrial Bonds that the new securities would be available for distribution on September 1, 1936. A copy of this notice, marked "Exhibit K," is attached hereto and by this reference made a part hereof. Thereafter on September 10, 1936, Petitioner surrendered its \$152,000.00 face amount of Colorado Industrial Company First Mortgage Five Per Cent Bonds in exchange for \$60,800.00 face amount of the Income Mortgage Bonds and 3,040 shares of the stock of The Colorado Fuel and Iron Corporation. At the same time and in due course the other holders of Industrial Bonds surrendered their certificates for cancellation in exchange for Income Bonds and shares of stock in the new company upon the same basis as provided in the Plan.

10. Pursuant to the Order of June 20, 1936, the properties of The Colorado Fuel and Iron Company and the Colorado Industrial Company, and all the right, title, and interest of the Trustees under the Industrial Company Mortgage were transferred to the new company as of July 1, 1936, as is recited in the final report of the Reorganization Trustee, dated September 12, 1938,

32 and filed September 13, 1938. A copy of said conveyance, marked "Exhibit L," and an extract from said report, marked "Exhibit M," are attached hereto and by this reference made a part hereof. By June 30, 1938, \$11,029,200.00 face value Income Bonds and 551,460 shares of stock in the new company had been distributed in exchange for Industrial Bonds pursuant to the Plan and the Order of April 25, 1936, leaving only \$24,000.00 face value of Income Bonds and 1,200 shares of stock still to be distributed. On the same date all but 1,714 shares of preferred stock in the old company, out of 20,000 shares, and all but 20,572 shares of common stock in the old company, out of 340,505 shares, had been exchanged for warrants. On the same date only 465 shares of stock in the new company had been issued for cash upon the exercise of the warrants, all as recited in Exhibit "M," the extract from the Final Report of the Trustee. The first exercise of the warrant options for purchase of stock in the new company occurred on October 23, 1936, and it was for 37 shares.

11. Immediately after the consummation of the plan of liquidation, 552,860 shares of stock of the new company were issued, and all of these shares belonged to the holders of Industrial

Bonds in accordance with the provisions of the Plan and the order of April 25, 1936. No stock was issued to parties other than the Industrial bondholders until October 23, 1936, and by June 30, 1938, only 465 shares had been issued to other parties (the 465 shares referred to above as issued upon the exercise of warrants). The warrant agreement, Exhibit "J," provided, in Article Twelve thereof, that the holders of warrants should not have the right to vote or to receive notice as stockholders, nor should they have any rights whatsoever as stockholders.

12. On the date of exchange the fair market value of the securities received in exchange for Industrial Bonds was \$79.00 for each \$100.00 face amount of Income Bonds and \$27.25 for each share of stock in the new company, a total of \$130,872.00.

By Order of Court, dated October 12, 1938, and filed November 13, 1938, copy of which, marked "Exhibit N," is attached
33 hereto and by this reference made a part hereof, the reorganization proceedings were concluded and the Trustee discharged.

It Is Further Stipulated And Agreed that either party hereto may introduce such further and additional evidence, not inconsistent with the facts above stipulated, as may be material to any of the issues herein, and that the exhibits attached hereto and referred to herein may be given the same force and effect as if the same had been duly offered and received in evidence in open court.

Dated this 19th day of September 1939.

Quigg Newton, Jr.,

Quigg Newton, Jr.,

RICHARD M. DAVIS,

Richard M. Davis,

Counsel for Petitioner,

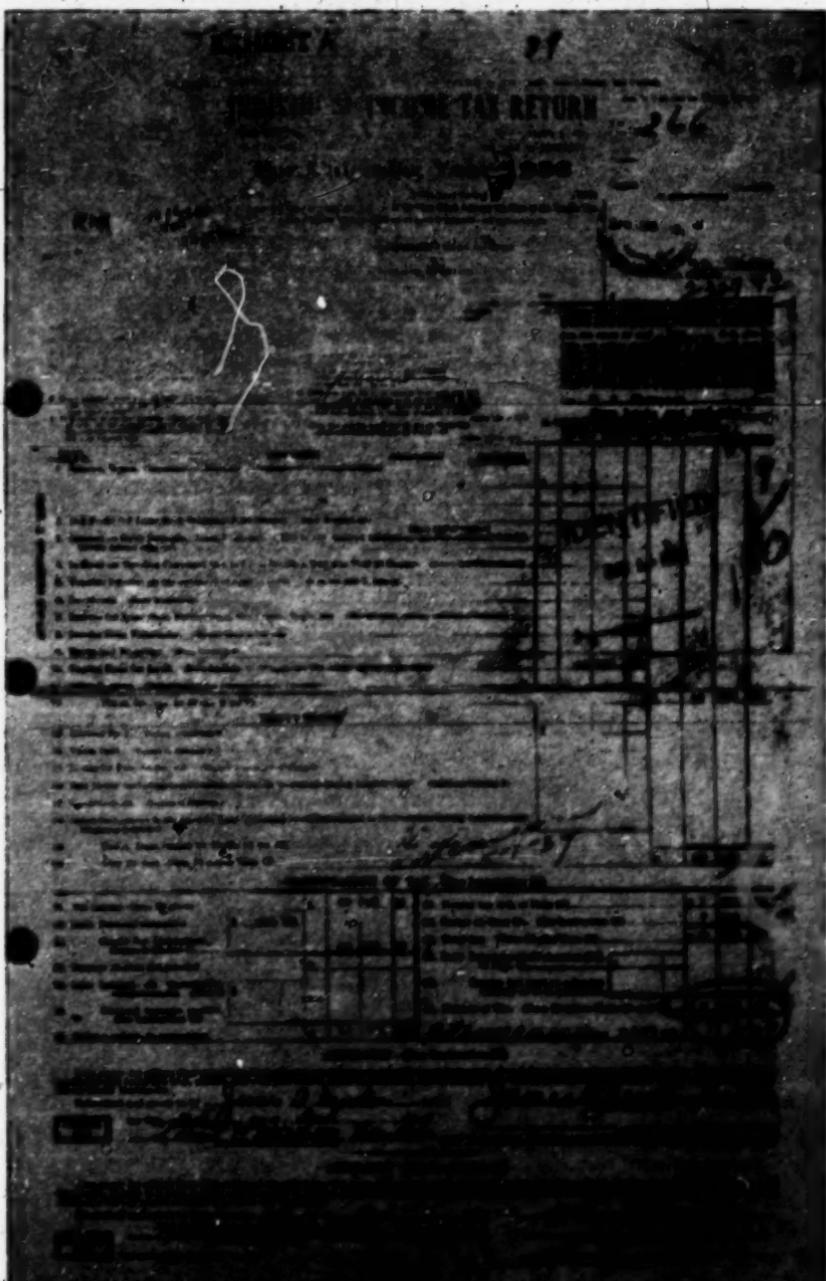
J. P. WENCHEL,

R. L. W., J. P. Wenchel,

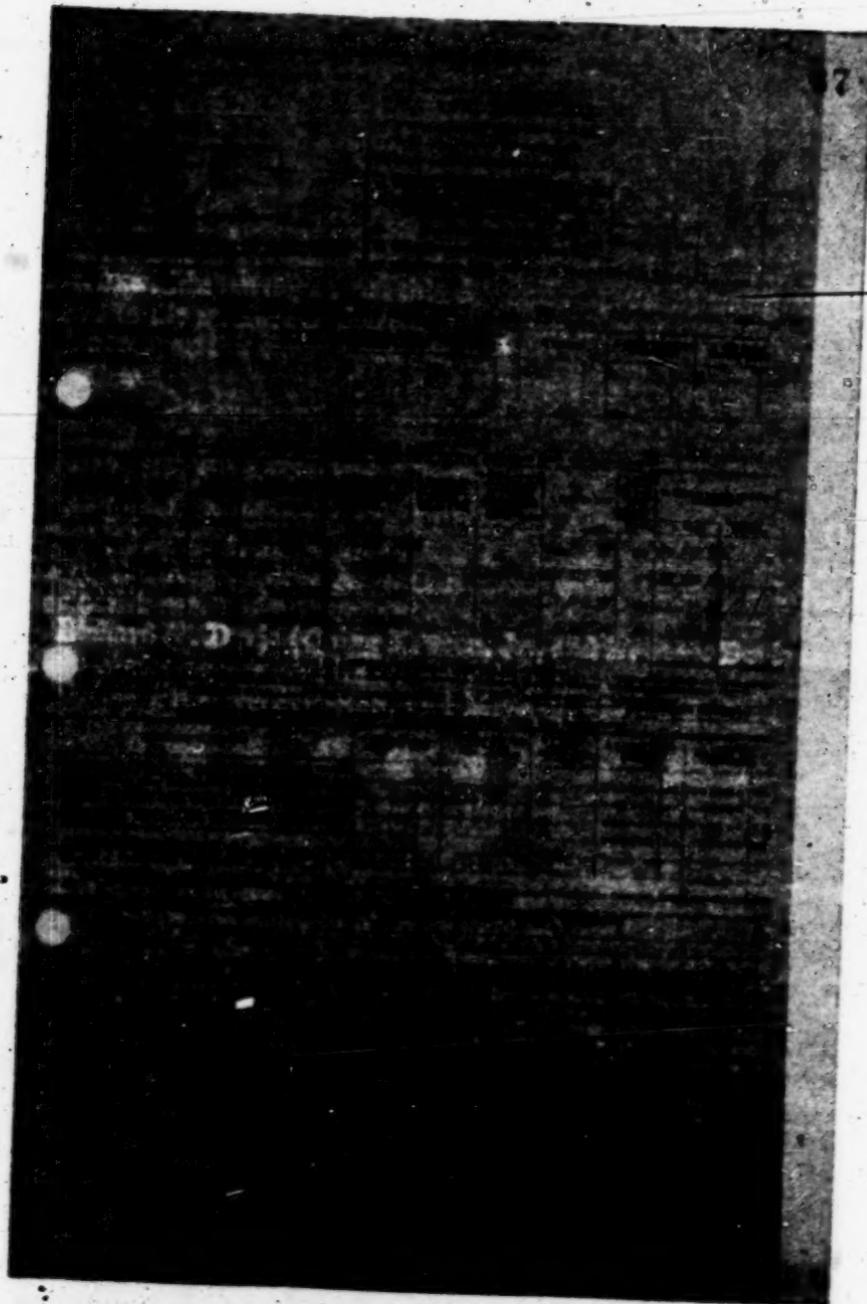
Chief Counsel, Bureau

Internal Revenue.

Exhibit A



30 GUY T. HELVERING VS. JAMES Q. NEWTON TRUST
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GUY T. HELVERING VS. JAMES Q. NEWTON TRUST

31

39 JAMES Q. NEWTON TRUST—CAPITAL GAINS & LOSSES

1936

SCHEDULE D

Security	Sold		Bought		Gain or loss
	Date	Cost	Date	Sale price	
(a) (Under one year):					
200 Sears Roeback & Co.	1- 6-36	\$11,996.75	10-23-35	\$11,985.00	\$11.75
200 Sears Roeback & Co.	1- 6-36	11,996.76	11- 2-35	12,035.00	38.24
500 Standard Oil N. J.	1-16-36	26,885.71	12-27-35	24,700.00	2,185.71
100 Pullman	2-14-36	4,625.90	1-27-36	4,290.00	335.90
500 U S Steel	2-14-36	28,924.41	1-16-36	24,450.00	4,479.41
500 Holly Sugar	3-21-36	17,079.65	1-13-36	10,437.50	6,642.15
400 Standard Oil Calif.	3-21-36	22,729.53	2-20-36	23,387.50	657.97
500 Standard Oil Indiana	3-25-36	19,148.36	4-23-35	12,762.50	6,385.86
500 Bethlehem Steel	3-25-36	28,116.93	2-20-36	29,462.50	1,345.57
500 Swift & Co.	3-25-36	11,411.02	2-10-36	12,187.50	776.48
200 Cluett-Peabody	3-25-36	12,746.74	1-17-36	11,235.00	1,511.74
600 American Metals	3-25-36	17,004.65	11-18-35	15,362.50	1,642.15
100 American Sumatra Tob.	3-25-36	2,453.45	1-27-36	2,565.00	111.56
100 Texas Corp.	5- 5-36	3,379.68	4-30-36	3,252.50	127.18
100 General Motors	5- 5-36	6,327.87	4-30-36	5,955.00	372.87
200 Standard Oil Indiana	5- 5-36	6,946.86	4-30-36	6,805.00	141.86
100 U. S. Steel	5-16-36	5,598.38	4-30-36	5,617.50	19.12
500 Great Western Sugar		17,720.63	4-22-36	16,937.50	792.13
300 Holly Sugar	6-30-36	10,527.57	6-17-36	9,895.00	632.97
200 Electric Auto Lite	6-30-36	7,073.84	4-30-36	6,755.00	318.84
300 Allied Stores	7-13-36	6,089.87	7- 9-36	5,312.50	777.37
500 Electric Bond & Share	7-29-36	13,190.97	1-22-36	10,500.00	2,600.97
500 Radio	8-13-36	5,402.39	6-11-36	6,312.50	910.11
200 Bethlehem Steel	8-21-36	11,871.76	6-16-36	10,935.00	936.76
500 Northwest Bancorp.	8-22-36	4,692.50	5-18-36	5,850.00	1,157.50
500 Middle West Corp.	9-10-36	6,248.87	4-22-36	4,150.00	2,098.87
200 American Sugar Refg.	9-10-36	11,946.76	5-27-36	11,910.00	36.76
200 Servel	9-10-36	5,036.79	6-23-36	4,775.00	261.79
200 Cont'l Oil	9-10-36	6,011.37	6-23-36	6,105.00	93.63
500 Allied Stores	9-10-36	6,414.86	8-25-36	6,437.50	22.64
500 Speery VTC	9-10-36	10,354.54	8-25-36	10,625.00	270.46
1000 South Amer Gold & Plat.	10- 3-36	4,664.50	2- 5-36	5,762.50	1,118.00
400 General Motors	10-13-36	26,264.87	4-30-36	35,775.00	480.27
500 Bethlehem Steel	10-13-36	37,479.23	10- 3-36	36,337.50	1,141.73
500 Pure Oil	10-13-36	9,114.80	8-25-36	8,562.50	552.30
500 New York Central	11- 7-36	23,267.00	10-16-36	24,250.00	982.96
500 Republic Steel	11- 7-36	12,442.22	10-19-36	12,937.50	495.26
300 Standard Oil Indiana	11- 7-36	13,138.96	9-29-36	11,370.00	1,768.96
200 Standard Oil Indiana	11- 7-36	8,771.82	7-14-36	7,355.00	1,416.82
300 Callahan Zinc & Lead	11- 7-36	3,808.71	10- 3-36	4,725.00	916.29
200 Colgate Palmolive Peet	11- 7-36	2,460.93	9-28-36	3,075.00	385.93
200 Waukesha Motor Co.	11- 7-36	7,566.34	10-10-36	5,517.50	2,068.84
200 Pullman	11-12-36	11,746.76	6- 3-36	9,605.00	2,141.76
100 Godchaux Sugar	11-14-36	2,625.94	8-31-36	1,887.50	738.44
200 Pullman	12-18-36	12,771.74	11-28-36	12,035.00	736.74
100 Van Raalte	6-30-36	3,818.17	4-30-36	3,415.00	403.17
Total gain		(100%)			
Total loss		(100%)			
(b) (1-2 years):					
120 Radio \$3.50 Pfd.	8-15-36	8,929.58	5- 6-35	4,331.06	4,598.96
100 Radio Common	8-13-36	1,080.47	5-30-35	585.04	495.43
500 Tintic Standard Mng	2-14-36	3,049.80	2-14-34	3,500.00	450.20
500 United Air Lines	3-21-36	9,621.30	12-27-34	2,975.00	6,646.30
80 Illegible	11-14-36	Figures	Illegible	2,752.50	1,334.70
Totals		(80%)			
(c) (2-5 years):					
50 Ingersoll Rand	4-19-36	6,276.82	1-17-34	3,388.25	2,888.57
6 Cache La Poudre	10-16-36	151.02	1-16-34	120.65	30.37
Totals		(60%)			
(d) (5-10 years):					
250 Claude Neon Lights	1936		1936	Final distribution	-280.00
9M Reynolds Investing 5%	1928& Y-36	7,488.74	1928& '29	9,870.83	1,388.00
Totals		(40%)	Illegible		

41

TREASURY DEPARTMENT,
OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
Denver, Colorado, March 15, 1937.

IT Circular #61-FY.

IT:GES.

JAMES Q. NEWTON TRUST,

% Boettcher & Company, 828 17th Street,
Denver, Colorado.

In reply to your request of recent date, an extension of time to May 1, 1937 is hereby granted in which to file your income tax return for the year ending December 31, 1936.

Where an extension of time for filing a return is granted, the time for the payment of the first installment is postponed for the period of the extension, and under the Revenue Law, there is to be added as part of such installment, interest at the rate of 6% per annum from the original due date of such installment to the date of payment.

This extension does not apply to information returns, Forms 1096 and 1099, covering reports of payments of salaries, wages, rents, etc.

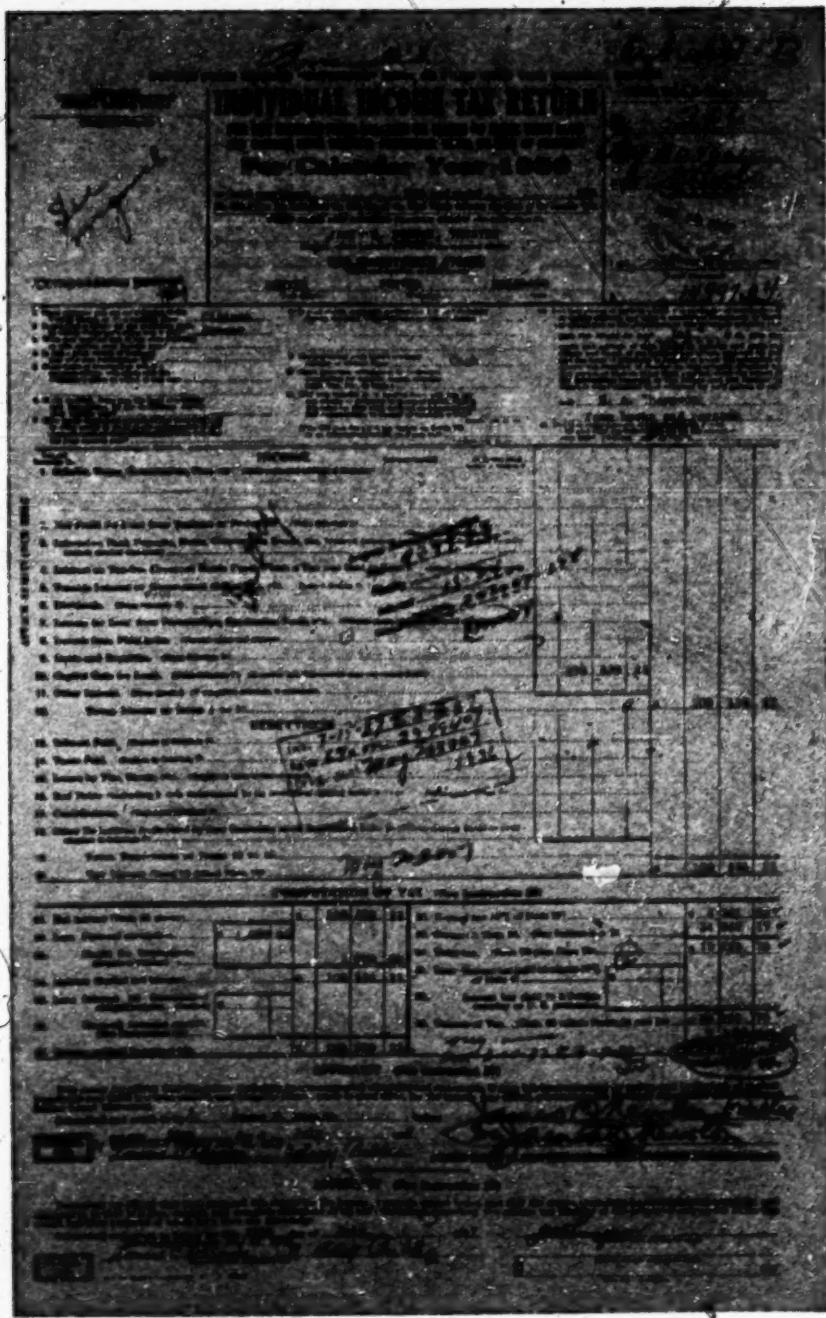
It is necessary that a copy of this letter be attached to your return as authority for the extension herein granted.

Respectfully,

GUY T. HELVERING,
Commissioner,
By RALPH NICHOLAS,
Collector.

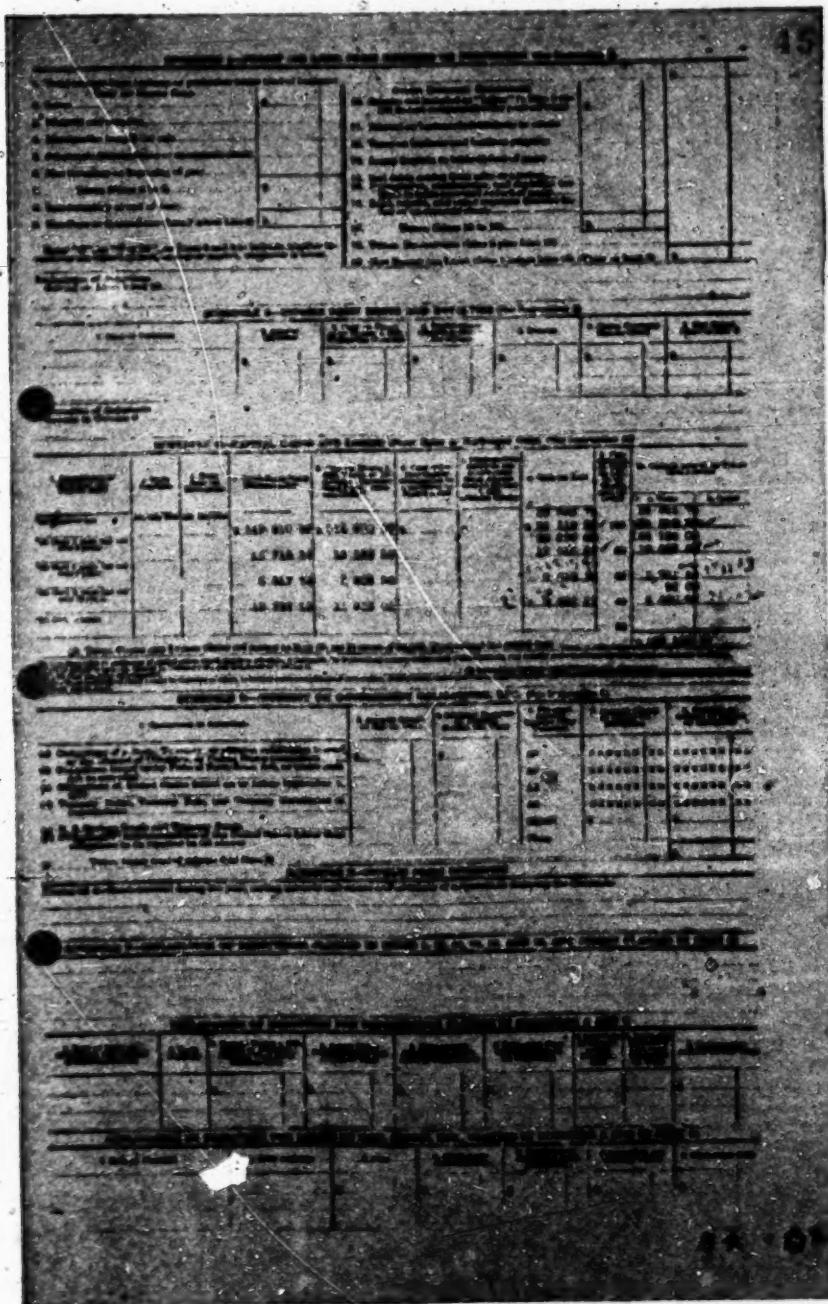
Enclosure: CC

Exhibit B



34 GUY T. HELVERING VS. JAMES Q. NEWTON TRUST

45



47

Bill to become

BOETTCHER AND COMPANY, INCORPORATED
INVESTMENT BANKERS
626 SEVENTEENTH STREET
DENVER, COLORADO

August 4, 1937



Collector of Internal Revenue
Denver
Colorado

Dear Sir:

Enclosed please find annual return for the tax year 1936 of James Q. Newton, Trustee, and James Q. Morton, Jr., together with checks covering the first two quarterly payments of the additional tax for both accounts.

Please consider these funds as having been paid under protest.

The additional tax is due to the ruling of your Department that the reorganization of the Colorado Fuel & Iron Company was profitable to the holders of that company's securities. This means that, without the passing of my securities, we have a tax imposed upon me, which, in turn, means a capital tax. I am sure our Congress does not intend to levy capital taxes at this time.

Please advise what steps I may take to further my position of protest.

15-9946.07
7703

Very truly yours

James Q. Newton

paid 9-17-16
Get 15-901
May 20-1937
02

36 GUY T. HELVERING VS. JAMES Q. NEWTON TRUST

49

Exhibit C to stipulation

Exhibit A to Petition

TREASURY DEPARTMENT,
Washington, December 3, 1938.

JAMES Q. NEWTON TRUST,
828 17th Street, Denver, Colorado.

DEAR SIR: You are advised that the determination of your income tax liability for the taxable year ended December 31, 1936, discloses a deficiency of \$12,325.60 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By (a) BERT E. HELVERN,
Internal Revenue Agent in Charge.

Enclosures:

Statement.

Form of Waiver. 870.

50

STATEMENT

IT:CL:P-7.
(FLD-90D).

JAMES Q. NEWTON TRUST

828 17th Street, Denver, Colorado

Tax Liability for the Taxable Year Ended December 31, 1936

	Liability	Assessed	Deficiency
Income Tax	\$31,619.30	\$39,296.70	\$12,325.60

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated October 25, 1938.

Adjustments to Net Income

Net Income as disclosed by Amended Return.....	\$109,538.23
Unallowable deductions and additional income:	
(a) Fiduciary income increased.....	19,880.00

Net income adjusted..... 129,418.23

(a) The additional income is the share of your trust to the additional income of the entire trust before allocation of the beneficial interests. See Exhibit B.

The additional income of the Trust is as follows:

Net income as per Fiduciary Income Tax Return.....	\$96,761.41
Unallowable deductions and additional income:	
(a) Additional Capital Gains.....	79,709.75
(b) U. S. Income Tax deficiency for 1934, paid in 1936.....	1,520.22

Net income adjusted..... 174,901.38

Explanation of Adjustments

(a) Capital Gains, increased..... \$79,709.75

Your trust held \$152,000.00 par value bonds of the Colorado Industrial Company's 5% 30-year Gold Bonds which were guaranteed by the Colorado Fuel & Iron Company.

The latter company reorganized under the name of Colorado Fuel & Iron Corporation, and exchanged its own bonds and stock (common) September 1, 1936, for the Colorado Industrial Company bonds.

51. The basis for this exchange was \$400.00 par bonds and 20 shares of stock of the new company for each \$1,000.00 par bonds of the Colorado Industrial Company.

For its \$152,000.00 par bonds of the Colorado Industrial Company, your trust received in exchange therefor \$60,800.00 par value bonds and 3,040 shares of common stock of the new Colorado Fuel & Iron Corporation.

This was a taxable exchange, although not so considered by the trust, and the Bureau held in letter addressed to this office, dated January 14, 1938, symbols: IT:EV:Se-PWL, the market value of the new securities on September 1, 1936 was determined to be as follows:

Bonds.....	\$85.25
Stock.....	32.25

Following the decision of the Bureau as to the taxability of the exchange, the trust did not file an amended fiduciary return for 1936 but did file an amended return on form 1040, using the following values in the computation of the gain from the exchange:

Bonds.....	\$79.00
Stock.....	26.50

The deficiency resulting from this adjustment was paid under protest and the trust intends to protest the present adjustment also, the chief basis for protest being the contention that the C. F. & I. marked up its assets prior to the reorganization some \$13,000,000.00 and six months after the reorganization wrote their assets down by practically the same amount, hence the valuation for the new securities was not properly reflected in the Bureau's valuation, nor by the market quotations immediately following the reorganization, since any sales of consequence following the reorganization would have caused the market quotation to drop to a figure more in keeping with the true value of the securities in question.

For complete details of the computations involved in the exchange, see Exhibit A, this statement.

(b) U. S. Income Tax deficiency for 1934 paid in 1936 is an unallowable deduction for income tax purposes as per Section 23 (e) (1) of the Revenue Act of 1936.

Computation of Tax

Taxable year 1936

Net income adjusted.....	\$129,418.23
Less: Personal exemption.....	1,000.00
Balance (surtax net income).....	128,418.23
Net income subject to Normal Tax.....	128,418.23
Normal tax 4% on \$128,418.23.....	5,130.73
Surtax on \$124,418.23 ¹ (Amount in excess of \$4,000.00).....	46,482.57
Total tax.....	51,619.30
Correct income tax liability.....	51,619.30
Income Tax assessed:	
Original, Acct. No. 203007.....	39,299.63
Additional, Acct. No. 204001.....	20,994.07
	39,293.70
Deficiency of Income Tax.....	12,325.60

¹ Error in computation of surtax in R. A. R. and 30-day letter, \$100.00, corrected herein.

Exhibit A

C. I. C. Bonds Exchanged for C. F. & I. Stock and Bonds, 9-1-36

Purchased	C.I.C. (par.)	Cost	Exchanged	C. F. & I.	
				Bonds (par)	Stock (shares)
3-14-35	10,000.00	2,537.50	for	4,000.00	200
6-6-35	10,000.00	2,273.75	"	4,000.00	200
4-24-35	15,000.00	3,456.25	"	6,000.00	300
6-12-35	15,000.00	3,802.50	"	6,000.00	300
Group I.	80,000.00	12,670.00		20,000.00	1,000
9-18-35	5,000.00	1,575.50	for	2,000.00	100
9-19-35	10,000.00	3,071.25	"	4,000.00	200
10-1-35	10,000.00	3,097.50	"	4,000.00	200
10-9-35	5,000.00	1,462.50	"	2,000.00	100
10-25-35	22,000.00	7,114.50	"	6,000.00	440
6-2-36	50,000.00	34,325.00	"	20,000.00	1,000
Group II.	102,000.00	50,646.25		40,000.00	2,040
Total	152,000.00	62,716.25		60,000.00	3,040

Corrected			Used Amended #1040		
Group I:			Group I:		
200 Bonds @ \$86.25	17,000.00		200 Bonds @ \$79.00	15,900.00	
1,000 Stock @ 33.33	33,333.33		1,000 Stock @ 26.50	26,500.00	
Value of New	50,333.33		Value of New	42,330.00	
Group II:			Group II:		
405 Bonds @ \$86.25	34,782.00		405 Bonds @ \$79.00	32,232.00	
2,040 Stock @ 33.33	65,760.00		2,040 Stock @ 26.50	54,080.00	
Value of New	100,572.00		Value of New	86,392.00	

#	Value new	Cost old	Gain		Value new	Cost old	Gain
I	65,330.00	12,670.00	37,230.00	I	42,330.00	12,670.00	30,230.00
II	50,572.00	50,646.25	49,925.75	II	35,292.00	50,646.25	35,645.75
I	100,572.00	50,716.25	50,855.75	I	128,392.00	62,716.25	65,675.75
II	37,230.00 @ 100%	50,784.00	30,230.00 @ 100%	II	24,184.00	50,784.00	35,645.75
	49,925.75 @ 100%	49,925.75			35,645.75 @ 100%	35,645.75	
Taxable Gain		79,709.75		Reported Amended #1040		50,929.75	
Reported #1041				Corrected		78,709.75	
Additional		79,709.75		Additional		19,680.00	

	Ratio	Total	Capital gains	Flat provi-sion	Balance ordinary net income	2% tax paid at source
(1) Trust, Form 1040, Denver, Colo.		120,416.23	120,416.23			
(2) Mirr. Nelle S. Newton, 801 York St., Denver, Colo.	36	23,983.22		3,000.00	20,983.22	.23
(3) James Q. Newton, Jr., 801 York St., Denver, Colo.	36	7,196.65		3,000.00	4,196.65	.78
(4) Nancy Newton Davis, 75 Cherry St., Denver, Colo.	36	7,196.64		3,000.00	4,196.64	.78
(5) Ruth Newton Pierce, 200 North St., Buffalo, N. Y.	36	7,196.64		3,000.00	4,196.64	.77
		174,991.38	120,416.23	12,000.00	33,573.15	.46

Statement of points

Filed Jan. 8, 1941

Comes now the petitioner on review herein and makes this concise Statement of Points on which he intends to rely on the review herein, to wit:

The United States Board of Tax Appeals erred—

1. In ordering and deciding that there is an overpayment in income tax for the year 1936 in the amount of \$29,984.07.
2. In failing to sustain the deficiency determined by the Commissioner, less a proper reduction of said deficiency to reflect the adjustments agreed upon by the parties at the hearing before the United States Board of Tax Appeals.
3. In holding and deciding that the reorganization under Section 77B of the Bankruptcy Act constituted a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 12 (g) (1) (C).
4. In failing to hold and decide that the reorganization under Section 77B of the Bankruptcy Act did not constitute a reorganization under Section 112 (b) (3) of the Revenue Act of 1936, coming within the definition of a reorganization in Section 112 (g) (1) (C).
5. In holding that there was a continuity of interest of the transferors in the transferee within the scope and meaning of Section 112 (g) (1) (C) of the Revenue Act of 1936.
6. In holding and deciding that the gain resulting to the taxpayer from the exchange was not recognizable under Section 112 (b) (3).
7. In that its opinion and decision are not supported by its findings of fact and are contrary to law.

(Signed) J. P. WENCHEL,

C. A. R.

J. P. Wenchel,

*Chief Counsel,
Bureau of Internal Revenue.*

Statement of Service

A copy of this Statement of Points was mailed to attorneys for respondent on review this date, January 8, 1941.

(Signed) J. P. WENCHEL,

C. A. R.

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

[File endorsement omitted.]

187 Before United States Board of Tax Appeals

Designation of portions of record to be contained in record on review

Filed Jan. 8, 1941

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Tenth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:
 - (a) Petition, including annexed copy of deficiency letter and statement attached thereto.
 - (b) Answer.
3. Findings of fact and opinion promulgated August 6, 1940.
4. Decision entered September 6, 1940.
5. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
6. Stipulation of facts, including exhibits.
7. Statement of Points.
8. Any and all orders of enlargement of time for the preparation, transmission and delivery of the record, not included in record.
9. This designation of portions of record to be contained in record on review.

(Signed) J. P. WENCHEL,

C. A. R.

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

Statement of Service

188 A copy of this designation of portions of record to be contained in record on review was mailed to attorneys for respondent on review this date, January 8, 1941.

J. P. WENCHEL,

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

[File endorsement omitted.]

Before United States Board of Tax Appeals

Order enlarging time

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation and transmission of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Tenth Circuit, be and it is hereby extended to Feb. 24, 1941:

CHARLES P. SMITH,

Member.

Dated, Washington, D. C., Dec. 21, 1940.

jd.

Now, Feb. 7, 1941, the foregoing is certified from the record as a true copy.

B. D. GAMBLE,

Clerk,

U. S. Board of Tax Appeals.

Certificate

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 185, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeclipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 7th day of February, 1941.

[SEAL]

B. D. GAMBLE,

Clerk,

United States Board of Tax Appeals.

190 In the United States Circuit Court of Appeals for
the Tenth Circuit

Motion for consolidation, etc.

Filed Feb. 21, 1941

Now comes the Commissioner of Internal Revenue, by his attorney, Samuel O. Clark, Jr., Assistant Attorney General, and shows to the Court that the above-entitled causes, being Board of Tax Appeals Docket Numbers 97325 and 97324, respectively, were consolidated for hearing and decision in the Board of Tax Appeals; that, under date of August 6, 1940, the Board of Tax Appeals promulgated one opinion in the two proceedings; that the two proceedings in this Court involve substantially identical facts and the issues of law therein are the same; that, while separate records are being printed in the two cases due to separate stipulations of facts before the Board, there has been designated for printing only in the Newton Trust case exhibits "A" to "N," inclusive, attached to the stipulation therein; that these exhibits are common to the two cases and were so considered by the Board of Tax Appeals in its decision.

Wherefore, counsel for the Commissioner of Internal
191 Revenue moves the Court that the two above entitles
causes be consolidated for purposes of briefing and argu-
ment in this Court and that the exhibits "A" to "N," inclusive,
designated for printing in the Newton Trust case, be taken and
considered for all purposes as forming a part of the printed
record in the case of Commissioner v. James Q. Newton, Jr.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order granting motion for consolidation

April 7, 1941

These causes came on to be heard on the motion of petitioner
for the consolidation of the causes for the purpose of oral argu-
ment and were submitted to the court.

On consideration whereof, it is now here ordered by the court
that said motion be and the same is hereby granted and that
these causes be and the same are hereby consolidated for the
purpose of oral argument.

44 GUY T. HELVERING VS. JAMES Q. NEWTON TRUST

192 In United States Circuit Court of Appeals

Order of submission

Thirty-sixth Day, April Term, Wednesday, June 25th, A. D. 1941. Before Honorable Orie L. Phillips, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard and was argued by counsel, Arthur A. Armstrong, Esquire, appearing for petitioner, Richard Davis, Esquire, appearing for respondent.

On motions, petitioner was granted leave to file a reply brief herein within ten days from this day and respondent was granted leave to file an answer thereto within ten days thereafter.

Thereupon this cause was submitted to the court.

193 In United States Circuit Court of Appeals

Nos. 2267 and 2268—April Term, 1941.

Arthur A. Armstrong, Sp. Asst. to the Atty. Gen. (Samuel O. Clark, Jr., Asst. Atty. Gen., and Sewall Key and Samuel H. Levy, Sp. Assts. to the Atty. Gen., were with him on the brief) for petitioner.

Richard M. Davis (Quigg Newton, Jr., and Newton, Davis and Drinkwater were with him on the brief) for respondent.

Before PHILLIPS, HUXMAN, and MURRAH, Circuit Judges.

Opinion

July 24, 1941

PHILLIPS, Circuit Judge, delivered the opinion of the court. The ultimate questions here presented are identical with those considered by the court in Number 2270—Commissioner of Internal Revenue v. Cement Investors, Inc., this day decided, the facts being substantially the same, except as to the amount of bonds involved and the cost thereof to the respective taxpayers.

Therefore, on authority of Commissioner of Internal Revenue v. Cement Investors, Inc., the orders of the Board of Tax Appeals are respectively affirmed.

194 In United States Circuit Court of Appeals

Judgment

Forty-eighth Day, April Term, Thursday, July 24th, A. D. 1941. Before Honorable Orie L. Phillips, Circuit Judge, and Honorable J. Foster Symes, District Judge.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said United States Board of Tax Appeals be and the same is hereby affirmed.

On August 30, 1941, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States Board of Tax Appeals.

195

Clerk's certificate

United States Circuit Court of Appeals, Tenth Circuit

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains a full, true and complete copy of the transcript of the record from the United States Board of Tax Appeals, and full, true and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 2268, wherein Commissioner of Internal Revenue was petitioner and James Q. Newton Trust was respondent, as full, true and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 9th day of September, A. D. 1941.

[SEAL]

ROBERT B. CARTWRIGHT,

*Clerk of the United States Circuit
Court of Appeals, Tenth Circuit,*

By GEORGE A. PEASE,

Deputy Clerk.

196 Supreme Court of the United States

No. 645, October Term, 1941

Order allowing certiorari

March 9, 1942

On petition for writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

A petition for rehearing having been filed in this case upon the denial of a petition for writ of certiorari;

Upon consideration thereof, it is ordered by this Court that the said petition be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

197 In the Supreme Court of the United States.

Stipulation

Filed March 24, 1942

It is hereby stipulated by and between the parties hereto that Exhibits D through N, both inclusive, of the record need not be reprinted since these exhibits are identical with the corresponding exhibits in Helvering v. Cement Investors, Inc., No. 644, which will be heard immediately preceding the instant cause.

CHARLES FAHY,

Solicitor General of the United States,
Counsel for the Petitioner.

RICHARD M. DAVIS,

Counsel for the Respondent.

MARCH —, 1942.

